

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH NELSON,

Defendant-Appellant.

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UNPUBLISHED

June 21, 2005

No. 254585

St. Joseph Circuit Court

LC No. 02-11357-FH

Before: Hoekstra, P.J. and Jansen and Kelly, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm by a convicted felon, MCL 750.224f, felonious assault, MCL 750.82(1), possessing a firearm while committing felony, MCL 750.227b, and assault and battery, MCL 750.81(1). The trial court sentenced defendant as a second habitual offender, MCL 769.10 to one and a half to seven and a half years in prison for the felon in possession conviction, one and a half to six years in prison for the felonious assault conviction, two consecutive years in prison for the felony-firearm conviction, and twenty-three days in prison for the assault and battery conviction. We affirm.

I. Right to Counsel

Defendant first argues that he was denied his right to counsel during a critical stage of the proceedings when the court engaged in *ex parte* communications with the deliberating jury. Constitutional questions are subject to *de novo* review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant is not entitled to reversal of his conviction due to the *ex parte* notes between the judge and the deliberating jury. MCR 6.414(A) provides that “The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present.” During deliberations, the jury sent four notes to the court. The first two notes concerned evidentiary matters, requesting copies of witnesses’ statements or the reports about which they testified. Questions about evidentiary matters are administrative in nature. *People v France*, 436 Mich 138, 143; 461 NW2d 621 (1990). The failure to object to administrative communication is taken as evidence that the instruction was not prejudicial. *Id.* Defendant failed to object after being made aware of these communications and, on appeal, merely argues that the prejudice is “uncertain.” Therefore, we decline to find that the communication was prejudicial. *Id.*

In the third note, the jury asked if there was a way to avoid walking through the witnesses in the parking lot. This housekeeping communication carries the presumption that it was not prejudicial. *Id.* at 144. As such, it requires an objection at trial and a “firm and definite showing which effectively rebuts the presumption of no prejudice.” *Id.* Again, defendant made no objection at trial and merely asserts the prejudice is “uncertain.” We find no prejudicial error in this regard.

The fourth note could be categorized as substantive in nature: the jury asked, “Do we give a guilty or not guilty on the 4<sup>th</sup> count? The prosecutor said to ignore the 4<sup>th</sup> count. Should we still vote on the 4<sup>th</sup> count.” The court responded that it had to summon the attorneys for an answer. It then responded, “You must still vote on Count 4.” After the jury finished deliberating and before the verdict was read, the court stated on the record that the jury had sent him four questions. At that point, defense counsel neither objected nor commented. On the basis of this record, it appears that defense counsel was consulted in regard to this communication. As such, this communication was not *ex parte* and does not fall afoul of MCR 6.414(A).

## II. Right to an Impartial Jury

Defendant next contends that he was denied his Fourteenth Amendment right to equal protection of the law and his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community because there was only one African-American in the jury pool. We disagree. “Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed *de novo*.” *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross section of the community. *People v Hubbard (After Remand)*, 217 Mich App 459, 472-473; 552 NW2d 493 (1996). “To establish a *prima facie* violation of the fair cross-section requirement, the defendant bears the burden of proving ‘that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.’” *McKinney, supra* at 161. To establish a *prima facie* case of an equal protection violation through systematic discrimination in the composition of juries, a claimant must:

(1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*People v Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000).]

Further, to establish an equal protection violation, the defendant must show discriminatory intent. *People v Gladd (After Remand)*, 464 Mich 266, 284-285; 627 NW2d 261 (2001).

In support of these claims, defendant relies solely on comments by defense counsel and the trial court that African-Americans were underrepresented in the jury pool. Defense counsel suggested that such underrepresentation is “not something that is unusual” and is “almost

standard, at least from my experience practicing in this court.” The trial court stated, in its approximation, the percent of African-Americans in the county is ten to twelve and concluded that African-Americans were underrepresented in this jury pool because one out of forty-five potential jurors was African-American. With regard to defendant’s Sixth Amendment claim, this Court has held that a “bald assertion” of systematic exclusion is insufficient and defendant “has the burden of demonstration a problem inherent within the selection process that results in systematic exclusion.” *Williams, supra* at 526-527. Here, defendant has presented no evidence of systematic exclusion: the commentary of defense counsel and the trial court is not evidence. Similarly with regard to defendant’s equal protection claim, he has failed to demonstrate with evidence that the system for selecting veniremen is subject to abuse, that his racial group was underrepresented, or any discriminatory intent. Again, defense counsel’s and the trial court’s comments are not evidence. Therefore, we conclude that defendant has failed to establish these claims.<sup>1</sup>

### III. Right to Fair Trial

Defendant also contends that he was denied his constitutional right to a fair trial because the trial court “pierced the veil of impartiality,” “usurped the role of the prosecutor,” and was unable to perform its statutory and constitutional duties due to a debilitating personal condition and illness. We disagree.

Although a trial judge has wide discretion and power in matters of trial conduct, *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), a criminal defendant has the right to expect a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). “The test is whether the judge’s questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness’ credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant’s case.” *Id.* In context of the entire record, we conclude that the instances defendant cites do not demonstrate the trial court’s lack of impartiality; rather, they demonstrate that the trial court used its discretion to control the proceedings and remained balanced and fair during his presidency. Finally, defendant’s assertion that the court’s personal and professional problems resulted in a lack of impartiality is wholly without substantiation. “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

### IV. Sufficiency of the Evidence

Defendant next contends that the prosecution presented insufficient evidence to support his conviction. However, defendant’s contention is solely based on challenges to the credibility of the witnesses, not the sufficiency of evidence presented by the prosecution. Issues of

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<sup>1</sup> Defendant requested an evidentiary hearing on remand, but did not submit an affidavit or offer of proof regarding facts to be established as required by MCR 7.211(C)(1)(a)(ii). *Williams, supra* at 527 n 4.

credibility are left to the trier of fact and are not for this Court to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

#### V. Prosecutorial Misconduct

Defendant also suggests that the prosecution improperly bolstered the testimony of his witnesses. However, because defendant did not separately raise this issue in his statement of issues presented it is not properly before this Court. See MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

#### VI. Cumulative Error

Finally, defendant claims the cumulative effect of the errors at trial warrant reversal of his conviction. However, none of the errors ascribed by defendant were actual errors causing prejudice. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Therefore, defendant has not shown cumulative error meriting reversal.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly